

Thus, Congress cannot have intended to "occupy the field" of all OVS regulation.

More fundamentally, even if Congress did intend to preempt the field of OVS with respect to service and rate regulation, that says nothing about local governments' property rights. No "preempt the field" precedent of which we are aware has construed the doctrine to sanction a Fifth Amendment taking of property. The "preempt the field" doctrine simply cannot be transformed into a power to appropriate the fields — i.e., to appropriate local streets and rights-of-way that do not belong to the federal government.

3. The OVS provision may not be interpreted in such a way as to require a taking.

For the reasons discussed in our opening comments, the OVS provision specifically cannot be read to preempt state or local right-of-way authority, for constitutional reasons.⁹⁹ Since the OVS provision contains no specific intent to carry out a taking and contains no mechanism to award just compensation, it cannot be construed to sanction such a taking.

D. The LECs Present No Sound Policy Reason Favoring Preemption and the Resulting Taking.

The sole reason the LECs offer for preempting state and local authority is that such preemption is the only regulatory benefit an OVS operator would gain.¹⁰⁰ As noted above, that is

⁹⁹ See Comments of NLC et al. at 52-60.

¹⁰⁰ See, e.g., Bell Atlantic Comments at 32.

not true.¹⁰¹ If the LECs believe that Congress should have provided even more incentives, that belief does not authorize the Commission to override the statutory mandate.

Even if LECs were correct in suggesting that OVS could not succeed without (in effect) a subsidy in the form of free use of state and local rights-of-way, that particular property does not belong to Congress or the Commission to give away. If the LECs are determined to seek a federal subsidy to encourage them to adopt OVS, they should seek it openly from the federal budget, not by unfunded mandate. The LECs' attempt to promote a taking of state and local property under the OVS provision, if successful, would not "forestall future disputes and litigation," as NYNEX suggests.¹⁰² Rather, such an attempt would provoke such disputes and litigation — litigation that would unnecessarily delay the opportunity to test OVS in the market, as Congress intended.

VII. CONCLUSION

The comments submitted on the NPRM leave unaffected the key conclusions reached in our initial comments. In accordance with those comments, we propose the attached draft OVS rules in

¹⁰¹ See p. 12 supra.

¹⁰² NYNEX Comments at 31.

response to the Commission's request for proposed rules to assist it in crafting effective OVS regulations.

Respectfully submitted,

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ATTACHMENT

PROPOSED RULES FOR OPEN VIDEO SYSTEMS

THE NATIONAL LEAGUE OF CITIES; THE UNITED STATES CONFERENCE OF MAYORS; THE NATIONAL ASSOCIATION OF COUNTIES; THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; MONTGOMERY COUNTY, MARYLAND; THE CITY OF LOS ANGELES, CALIFORNIA; THE CITY OF CHILLICOTHE, OHIO; THE CITY OF DEARBORN, MICHIGAN; THE CITY OF DUBUQUE, IOWA; THE CITY OF ST. LOUIS, MISSOURI; THE CITY OF SANTA CLARA, CALIFORNIA; AND THE CITY OF TALLAHASSEE, FLORIDA

April 11, 1996

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[Bracketed references to "NLC Comments" refer to Comments of the National League of Cities et al. in this docket, filed April 1, 1996.]

PART __. OPEN VIDEO SYSTEMS

__ .1. GENERAL PROVISIONS.

(a) General principles.

(1) Open video systems approved pursuant to this Part shall provide open access to independent video programming providers, subject to the provisions of this Part.

(2) The Commission's rules under this Part shall be applied in a manner that reflects federal partnership with state and local governments in the authorization and regulation of open video systems.

(3) Nothing in this part affects the authority of a state or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(b) Preemption. Regulations under this Part shall not be interpreted to preempt state or local laws affecting open video systems as long as such state or local laws may be applied consistently with the Commission's rules.

__ .2. DEFINITIONS.

(a) Affiliate. Any person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with a person is an affiliate of that person.

(b) Cable service. "Cable service" shall have the same meaning as in the cable television rules, 47 C.F.R. § 76.5(ff).

(c) Independent video programming provider. An independent video programming provider is a person that (1) provides video programming of its own selection directly to subscribers over an open video system through a carriage agreement with the open video system operator; and (2) has no financial or business relationship with an open video system operator or any affiliate thereof, other than a carrier-user relationship. [NLC Comments, pp. 7-9]

(d) Open video system. An open video system is a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that (i) is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community; (ii) affords open access to independent video programming providers that are not affiliates of the open video system operator; and (iii)

complies with the Commission's rules under this Part, as certified by the open video system operator and approved by the Commission.

(e) **Open video system operator ("operator").** An open video system operator is any person or group of persons (A) who provides cable service over an open video system and directly or through one or more affiliates owns a significant interest in such open video system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such an open video system.

(f) **Subscriber.** A subscriber is a member of the general public who receives video programming distributed over an open video system and does not further distribute it.

(g) **Other terms.** Unless otherwise expressly stated, words not defined in this Part shall be given their meaning as used in Title 47 of the United States Code, as amended, and, if not defined therein, their meaning as used in 47 C.F.R.

.3. ELIGIBILITY. [NLC Comments, pp. 46-48]

(a) **Local exchange carriers.** A local exchange carrier, as defined in 47 U.S.C. § 153(44), may be an open video system operator in its telephone service area. No person that is not a local exchange carrier may be an open video system operator.

(b) **Cable operators.** Notwithstanding subsection 3(a), a cable operator may be an open video system operator only in a franchise area where (i) it is also a local exchange carrier and (ii) it is not a franchised cable operator.

(c) **Approval required.** No person shall build or operate an open video system unless and until the Commission has approved its certification pursuant to the provisions of this Part. No person shall build or operate an open video system with respect to which the Commission's approval has been withdrawn, terminated, or nullified.

.4. CERTIFICATION.

(a) **Filing of open video system certification.**

(1) A local exchange carrier that wishes to be an open video system operator must file with the Commission a certification, pursuant to the requirements of this Section, that the LEC complies with the Commission's regulations under this Part.

(2) An open video system certification and attachments shall be submitted both in paper form, including an original and ___ copies, as provided in the Commission's rules, and on a 3.5-inch diskette formatted in an IBM-compatible form using MS-DOS 5.0 or higher and WordPerfect 5.1 software. The diskette should be submitted in "read only" mode. The diskette shall be clearly labelled with the LEC's name and the legend "Open Video System Certification."

(b) Contents of certification.

(1) An open video system certification shall include the following basic information:

(A) The legal name of the proposed open video system operator ("applicant"), entity identification or social security number, and corporate form (such as individual, private association, partnership, or corporation).

(B) The assumed name(s), if any, to be used by the open video system operator for doing business.

(C) The name, address, telephone and facsimile numbers, and (where available) electronic mail address of the applicant, and the identity of the person or persons responsible for communications with the Commission regarding the certification.

(D) A list of all communities to be served by the proposed open video system, including the name and community unit identifier of each community and the county or counties in which it is located.

(E) The date on which the applicant proposes to commence providing service in each community.

(F) The name of any local exchange carrier with which the applicant is affiliated and a certification that the applicant is a local exchange carrier certified under all applicable state and local law throughout the area where the proposed open video system is to be constructed.

(2) A certification shall state that the proposed open video system will be built and operated in compliance with this Part and all other applicable law.

(3) A certification shall be accompanied by evidence sufficient to show on its face, for each community where the proposed system will use the public rights-of-way, that the applicant has obtained authorization to use such rights-of-way for purposes of the proposed open video system. Such evidence shall be provided in one of the following two forms: [NLC Comments, pp. 50, 52, 70]

(A) The applicant shall attach a fully executed document specifically granting authority to use such rights-of-way, including all pertinent agreements and conditions, and specifying the scope of the authority granted with regard to the uses that the applicant may make of the rights-of-way; or

(B) The applicant shall attach a fully executed document in which the state or local government unit having authority to grant permission to use the public rights-of-way for open video system purposes certifies that such authorization has been granted.¹

¹[If the Commission adopts rules allowing cable operators to become open video system operators, the following additional subsection should be added:] [NLC Comments, pp. 48-50]

(C) If the applicant is a cable operator, the certification shall be accompanied by a document in which the state or local government unit having authority to grant permission to use the public rights-of-way for open video system purposes consents to the applicant's approval as an open video system operator in that community.

(4) A certification shall be accompanied by evidence sufficient to show on its face that the applicant will meet all applicable obligations pursuant to 47 U.S.C. §§ 531, 534, and 535. Such evidence with regard to 47 U.S.C. § 531 shall be provided in one of the following two forms: [NLC Comments, pp. 71-72]

(A) The applicant shall attach fully executed documents in which the franchising authority for each jurisdiction in which the proposed open video system will be constructed certifies that the applicant has agreed to fulfill the same obligations under 47 U.S.C. § 531 as any incumbent cable operator in each such franchising authority's jurisdiction, including any future changes in such obligations; or

(B) The applicant shall attach a fully executed document in which the franchising authority for each jurisdiction in which the proposed open video system will be constructed certifies that the applicant has, after negotiation with such jurisdiction, agreed to fulfill equivalent obligations no greater or lesser than those applicable to any incumbent cable operator in each such franchising authority's jurisdiction, including any future changes in such obligations.

(C) The applicant will provide separate written certification that it has agreed to the arrangement set forth in subparagraph (A) or (B), as appropriate.

(5) A certification shall be accompanied by a listing of all video programming providers that will initially provide video programming on the proposed system, indicating clearly those providers that are independent video programming providers as defined in this Part. Such listing shall demonstrate on its face that the criteria specified in section 10(f) of this Part are met.

(6) A certification shall be accompanied by the applicant's complete carriage agreement with each independent video programming provider. The applicant shall certify to the Commission that each such carriage agreement is complete and that there are no other agreements or arrangements of any kind that, in the judgment of a reasonable person, might affect the terms, conditions, profitability or desirability of any such carriage agreement.

__ .5. APPROVAL.

(a) Public notice.

(1) When an open video system certification is received, the Commission will, by noon on the day following receipt, make such certification (including all attachments) available for public copying, review and comment —

(A) in paper form in the Commission's public reference room;

(B) in electronic form on the Commission's Internet server for access and retrieval at least by ftp, gopher, and World Wide Web.

(2) The Commission will maintain an electronic mailing list for notice of open video system certifications. The Commission will add to the mailing list any person who so requests. When a certification is filed, the Commission shall send an electronic mail message within 24 hours of receipt notifying all persons on this mailing list of such receipt and listing the applicant, the date of receipt, and the communities to which the certification applies.

(b) **Public comment.** The Commission shall receive and review all comments submitted with regard to a certification.

(c) **Facial completeness.** Upon receipt of a certification, the Commission will promptly determine whether the certification contains the information and attachments specified by this Part. If the certification is incomplete, the Commission will so notify the applicant within ten days of receipt, and shall reject the certification without prejudice to the applicant's resubmission with the required information.

(d) **Time limit.** The Commission shall act by order to approve, disapprove, or disapprove as incomplete any open video system certification within ten days after receipt of such certification. Any disapproval shall be without prejudice to any later resubmission by the applicant.

(e) **Approval subject to conditions.** Any approval of an open video system certification will be expressly made subject to the following conditions: [NLC Comments, p. 72]

(1) The open video system operator must continue to comply with all requirements of this Part and other applicable law.

(2) The open video system operator must obtain and maintain in force all necessary authorizations to use public rights-of-way for the open video system, and shall notify the Commission as soon as possible if any such authorization should terminate for any reason.

(3) The open video system operator must make all payments in lieu of franchise fees pursuant to 47 U.S.C. § 573(c)(2)(B) in timely fashion.

(4) The open video system operator must continue to provide all channel capacity, facilities, and services required pursuant to 47 U.S.C. § 531, including any changes in such requirements occurring after the date of approval.

(5) An open video system operator shall report any noncompliance with these requirements to the Commission as soon as possible upon discovery of such noncompliance.

(f) **Review of approval.** Any approval by the Commission shall be subject to review and withdrawal or decertification at any time pursuant to the provisions of this Part.

6. **ANNUAL REPORTS.**

(a) **Annual filing.** An open video system operator shall file an annual report with the Commission within sixty days after each anniversary of the Commission's approval of its certification. The Commission will publish notice of each such filing, and the annual reports will be made available for public review.

(b) **Contents of annual report.** Each annual report shall contain:

(1) any changes during the preceding year in the information required to be submitted with the operator's certification pursuant to section 4(b);

(2) an up-to-date list of all video programming providers, demonstrating on its face that the criteria specified in section 10(f) of this Part are met. If either criterion is no longer being met, the operator shall submit a complete explanation and detail any plans to restore the required condition;

(3) a schedule summarizing all rates charged in all carriage contracts;

(4) a description of any changes in local cable franchise requirements of which open video system operator is aware;

(5) financial information, including financial statements certified as true and accurate, for any affiliate that selects programming on the open video system (and for the operator itself if it selects such programming), sufficient to allow the Commission to determine the cash flow and rate of return for each such affiliate (or for the operator itself if it selects such programming). [NLC Comments, p. 19-20]

__7. APPLICATION OF OTHER REGULATIONS.

(a) Application to open video system operators. The following provisions of Part 76 that apply to cable operators shall also apply to open video system operators: Subpart A (General); Subpart D (Carriage of Television Broadcast Signals); Subpart E (Equal Employment Opportunity Requirements); Subpart O (Competitive Access to Cable Programming); Subpart Q (Regulation of Carriage Agreements); § 76.503 (National subscriber limits); § 76.504 (Limits on carriage of vertically integrated programming); §§ 76.610, 76.611, 76.613, 76.614, 76.615, 76.616, and 76.617 (relating to signal leakage and harmful RF interference). [NLC Comments, p. 44]

(b) Application to open video system programmers. The provisions of Subpart F of Part 76 that apply to cable operators shall also apply to any person that selects video programming for distribution over an open video system.

__8. OPEN ACCESS

(a) Open access principles.

(1) Except as otherwise expressly permitted in applicable law or in this Part, an open video system operator shall not discriminate among video programming providers with regard to carriage on its open video system, and its rates, terms, and conditions for such carriage shall be just and reasonable, and shall not be unjustly or unreasonably discriminatory.

(b) Acceptance of independent video programming providers.

(1) If the demand of video programming providers for carriage capacity exceeds the channel capacity available for such carriage on an open video system (not including

such channel capacity as is programmed by the open video system operator or an affiliate pursuant to this Part) at the time of certification, capacity shall be assigned to all requesting programmers that are qualified pursuant to subsections 9(g) and 9(h) herein, based on the proportion of the requested capacity to the total capacity available. [NLC Comments, p. 23]

(2) At any time when less than two thirds of the channel capacity on the system is occupied by independent video programming providers, any such programmer requesting carriage that is qualified pursuant to subsections 9(g) and 9(h) herein must be given carriage within thirty days of its request, whether or not such carriage would require the open video system operator to reduce the channel capacity it is using itself. [NLC Comments, p. 23]

(3) No entity shall be considered an independent video programming provider if it has any financial or business relationship whatsoever, by contract or otherwise, directly or indirectly, with the open video system operator or any affiliate thereof, except only the carrier-user relationship. [NLC Comments, p. 22]

NOTE 1: Examples of situations in which an open video system operator and a video programming provider will be deemed to be controlled or having a relationship include the following, among others: where one is the debtor or creditor of the other (except with respect to charges for communication services); where they have a common officer, director, or other employee at the management level; where there is any element of ownership or other financial interest by one in the other; where any party has a financial interest in both; and where the open video system operator selects, or influences the video programming provider, directly or indirectly, in selecting, programming carried on the open video system.

NOTE 2: An open video system operator may provide billing and collection services for an independent video programming provider in connection with carriage on its system without exceeding the carrier-user relationship. [NLC Comments, p. 22]

(c) Determination of channel capacity.

(1) If an open video system carries both analog and digital signals, an open video system operator must satisfy the access requirements of section 10(f) of this Part independently with regard to both analog and digital channel capacity. [NLC Comments, p. 14]

(2) For purposes of channel capacity calculations under this Part:

- (A) channels that the operator is required to carry pursuant to 47 U.S.C. §§ 531, 534, and 535 shall count neither as part of the total channel capacity, nor as part of the channel capacity for which the operator selects video programming services for carriage; and
- (B) any channel shared pursuant to section 9(d) of this Part shall count as part of the channel capacity for which the open video system operator selects video programming services for carriage, to the

extent that the operator is one of the programmers sharing such a channel. For example, if three programmers on an open video system offer channel A to their subscribers, and one of the three is an affiliate of the open video system operator, then channel A shall count as 1/3 of one channel for which the operator selects video programming services for carriage.

(3) An open video system operator may increase carriage capacity without limit and without prior approval by the Commission, provided that in the event of such an increase, the open video system operator shall meet all capacity requirements of this Part, including but not limited to the requirements of sections 8, 9, and 10, within sixty days after activation of such increased capacity. [NLC Comments, p. 8 n.7]

(4) To the extent that the carriage capacity of an open video system is not subject to calculation in terms of channels (for example, in a system transmitting video programming via a packet-switched network), the access requirements of section 10(f) of this Part shall apply to any features of the system that could limit a video programming provider's ability to provide video programming to subscribers, such as input ports, switches, and storage capacity. [NLC Comments, p. 24-25]

(d) Limitations on channel capacity offered to programmers.

(1) An open video system operator may not require an independent video programming provider to use or occupy any minimum channel capacity less than one half-hour, but shall make capacity freely available to such providers on single-channel and part-time bases. [NLC Comments, pp. 27-28]

(2) An open video system operator may not set a limit on the amount of channel capacity available to any independent video programming provider that is less than one-third of the activated channel capacity on its system, except to the extent necessary to satisfy the proportional allocation requirements of section 8(b)(1) of this Part. [NLC Comments, p. 14-15]

(3) An open video system operator may not require a minimum contract period of more than one month from any independent video programming provider, nor require a maximum contract period of less than one year, but shall make available flexible contract arrangements to encourage carriage by independent video programming providers.

(e) Channel capacity assignable. Any independent video programming provider that obtains channel capacity from an open video system operator under any arrangement shall be freely able to assign, sublease, or otherwise transfer to any other person ("sublessee") the right to select programming for that channel and to act as a video programmer thereon. No open video system operator shall place any conditions, directly or indirectly, on such rights of an independent video programming provider, except that any sublessee may be required to comply with any technical or similar requirements that the open video system operator imposes on all programmers including itself and its affiliates. [NLC Comments, p. 24]

(f) Carriage of cable operators. A cable operator may not provide video programming through an open video system in any area where the cable operator holds a

franchise to provide cable service through a cable system, except to the extent such provision is authorized by the Commission, consistent with the public interest, convenience, and necessity. A cable operator may seek such authorization by filing a petition for special relief pursuant to section 76.7 of the Commission's rules, and the Commission shall act on any such petition on a case-by-case basis. [NLC Comments, pp. 51-52]

.9. NONDISCRIMINATION IN CARRIAGE ARRANGEMENTS.

(a) **Nondiscrimination principle.** An open video system operator shall not discriminate among video programming providers, including itself or its affiliates, with regard to carriage on its open video system.

(b) **Types of capacity.** If an open video system carries both analog and digital signals, an open video system operator must satisfy the nondiscrimination requirements of this section independently with regard to both analog and digital channel capacity, and to any other portions using different formats (e.g., compressed), as well as with regard to the system as a whole. [NLC Comments, p. 14]

(c) **Program selection.** An open video system operator shall not unreasonably discriminate among video programming providers, including the operator itself or its affiliates, with regard to — [NLC Comments, p. 15]

- (1) positioning in any channel sequence or accessibility through any navigational device, guide, or menu;
- (2) any material or information (including advertising) provided by the operator to subscribers for the purposes of selecting programming on the open video system operator, or in the way such material or information is presented to subscribers;
- (3) identification of any programming service to subscribers. In particular, an open video system operator shall ensure that video programming providers and copyright holders can suitably and uniquely identify their programming services to subscribers, and shall transmit without change or alteration any such identification that the video programming provider transmits as part of the programming signal.

(d) **Channel sharing.** An open video system operator shall carry on only one channel any video programming service that is offered by more than one video programming provider (including the operator or its affiliate). If such channel sharing occurs, the open video system operator shall ensure that subscribers to each video programming provider have ready and immediate access, on a nondiscriminatory basis, to each such shared video programming service. [NLC Comments, p. 26]

(e) **Marketing arrangements.** An open video system operator or its affiliate may not offer to its subscribers programming carried by an independent video programming provider on that system, provided, however, that an open video system operator or its affiliate may obtain the same programming independently and may offer it through a shared channel pursuant to subsection 9(d). [NLC Comments, pp. 25-26]

(f) **Technical information.** An open video system operator shall make available publicly and on a nondiscriminatory basis all technical and similar information necessary to enable video programming providers, including the operator itself and its affiliates, to provide video programming through the open video system.

(g) **Financial requirements.** An open video system operator may not require an independent video programming provider to satisfy financial requirements or to demonstrate creditworthiness or financial stability, except that the operator may require an independent video programming provider to pay two months' carriage charges in advance as a security deposit. [NLC Comments, p. 27] An open video system operator may not discriminate among independent video programming providers based on financial qualifications.

(h) **Other requirements.** An open video system operator may impose the following requirements on video programmers, including the operator itself and its affiliates, on a nondiscriminatory basis:

- (1) to provide reasonable evidence, prior to carriage, of its lawful access to the programming that will be carried on the system, and to indemnify the operator against any costs resulting from unlawful carriage;
- (2) to meet reasonable technical standards; and
- (3) to provide programming in a reasonably timely manner, so that channel capacity is not left unused.

__10. RATES.

(a) **Reasonable rate principle.** An open video system operator shall set rates, terms, and conditions for carriage that are just and reasonable, and are not unjustly or unreasonable discriminatory, both as between different independent video programming providers and as between such independent video programming providers and the operator or its affiliates. Carriage rates shall offer the widest possible opportunity for participation of independent video programming providers and for diversity of programming. [NLC Comments, p. 15-16]

(b) **Establishment of carriage rates.** An open video system operator shall establish reasonable rates for carriage. [NLC Comments, p. 18]

(c) **Change in carriage rates.** An open video system operator may change its rates for carriage no more than once annually, subject to the provisions of this Part. Each

independent video programming provider shall receive at least thirty days' advance notice of any increase in its carriage rates.

(d) Open pricing. An open video system operator must make all agreements and rates for carriage publicly available at all times, including all related terms and conditions as indicated in section 4(b)(6) of this Part. Any such agreements entered into after initial certification must be filed with the Commission within fifteen days after execution. [NLC Comments, p. 18]

(e) Uniform pricing.

(1) An open video system operator must justify any differences in the rates, terms, or conditions offered to video programming providers charged, including itself and its affiliates, at the time such arrangements are filed with the Commission. The open video system operator must show that such differences are just, reasonable, and nondiscriminatory based on one or more of the following grounds: [NLC Comments, pp. 16, 18, 27]

- (A) the requirements of 47 U.S.C. §§ 531, 534, and 535;
- (B) the open video system operator's actual costs of providing carriage; and
- (C) reasonable discounts offered to nonprofit independent video programming providers.

(2) An open video system operator shall not impose different rates, terms, or conditions based on the content of the programming to be offered by any independent video programming provider.

(3) Each carriage agreement with an independent video programming provider shall contain a "most favored nation" clause, pursuant to which the independent video programming provider will receive the benefit of any more favorable rates, terms, or conditions that the open video system operator offers to any other similarly situated programmer, including itself or its affiliates. If such a clause is not included in a carriage agreement, the open video system operator shall provide a complete explanation at the time the agreement is filed with the Commission. [NLC Comments, p. 19]

(f) Reasonable rate standard. An open video system operator's uniform carriage rates shall be presumed reasonable if: [NLC Comments, p. 20]

- (1) at least four independent video programming providers provide service on the open video system; and
- (2) independent video programming providers occupy at least one third, in the aggregate, of the activated channel capacity on the open video system.

If these conditions are not met, an open video system operator's carriage rates shall be presumed unreasonable and subject to investigation and to cost and rate-of-return analysis, either on complaint by any interested party or by the Commission on its own motion.

(g) Correction of unreasonable rates. If the Commission finds that an open video system operator's carriage rates are unreasonable, the Commission may establish such operator's

rates using a cost-based method ensuring that the operator earns no more nor less than a reasonable rate of return. If, however, the Commission does not establish rates on this basis within sixty days after the Commission finds the operator's rates to be unreasonable, the operator must automatically reduce by ten percent all carriage rates that the Commission found to be unreasonable. The operator shall then, within sixty days after the change in rates, resubmit the information required in section 4(b)(5) of this Part, together with any other information necessary to show whether the criteria specified in section 10(f) of this Part have met, and the Commission shall re-evaluate the operator's compliance on the basis of such resubmission.

(h) **De minimis differences.** If the Commission finds that any differences in rates, terms, or conditions among video programming providers (including the operator or its affiliates) are de minimis or otherwise insignificant, then each video programming provider shall be able to select, at its option, among such differing sets of conditions, and the operator must make such alternative arrangements available to it.

__ .11. FEES IN LIEU OF FRANCHISE FEES.

(a) **Fee obligation.** Subject to the provisions of this Part, any franchising authority may require any open video system operator providing service in its franchising area to pay a fee on the operator's gross revenues for the provision of cable service, in lieu of the franchise fees permitted under 47 U.S.C. § 542.

(b) **Notice procedure.** Prior to beginning service on an open video system, the operator shall notify in writing each franchising authority in whose area the system will operate that the franchising authority may require the operator to pay fees under this section. At any time after such notice or after the commencement of service, the franchising authority may notify the open video system operator that it requires such fees. When the franchising authority gives such notice, it shall also notify the open video system operator in writing of the rate at which the open video system operator must pay its fees, subject to the provisions of this Part, and of the rate at which franchise fees are imposed on any cable operator transmitting programming in the franchise area. The franchising authority shall also notify the open video system operator in writing of any change in the rate at which the open video system operator must pay its fees, subject to the provisions of this Part.

(c) **Computation of fees.**

(1) The franchising authority may require fees for an open video system operator to be calculated on the same revenue base for which franchise fees are calculated for any cable operator in the franchise area. Such revenues may include, without limitation, billings to subscribers; late fees and administrative fees; fees, payments, or other consideration that the operator receives from video programming providers for carriage of programming on the

system; advertising revenues; and revenues from home shopping and bank-at-home channels. [NLC Comments, pp. 45-46]

(2) The franchising authority may require fees for an open video system operator to be calculated using the same rate by which franchise fees are calculated for any cable operator in the franchise area.

(d) **Limitation on fees.** The rate at which a franchising authority imposes fees on an open video system operator shall not exceed the rate at which it imposes franchise fees on any cable operator transmitting video programming in the franchise area.

(e) **Payment of fees.** An open video system operator shall pay its fees on the same basis as cable franchise fees are required to be paid in each franchise area, including with respect to number and timing of payments and late fees or interest. If no cable operator is franchised to serve a given franchise area, the open video system operator shall negotiate payment arrangements with the franchising authority.

(f) **Designation of fees.** An open video system operator may designate that portion of a subscriber's bill attributable to the fee under this section as a separate item on the subscriber's bill.

__12. PUBLIC, EDUCATIONAL, AND GOVERNMENTAL CHANNELS, SERVICES, AND FACILITIES.

(a) **Access obligation.** A franchising authority may require an open video system operator to provide channel capacity, services, facilities, and equipment ("access obligations") pursuant to 47 U.S.C. § 531, subject to the provisions of this Part. [NLC Comments, pp. 30, 33-34]

(b) **Establishing access obligations.**

(1) An open video system operator's access obligations shall be independently determined under this subsection for each franchise area served.

(2) An open video system operator may meet the requirements of subsection 12(a) in either of two ways, at the operator's option: [NLC Comments, pp. 31-32, 35-36]

(A) the open video system operator shall fulfill the same access obligations as does the cable operator franchised to provide cable service in the franchise area; or [NLC Comments, pp. 32-34]

(B) the open video system operator shall reach an agreement with the franchising authority to fulfil access obligations that are substantially equivalent to those of the cable operator franchised to provide cable service in the franchise area. [NLC Comments, pp. 35-37]

(3) If no cable operator is franchised to serve any part of the area the open video system will be authorized to serve, the open video system operator shall reach an agreement pursuant to subsection 12(b)(2)(B). [NLC Comments, pp. 37-39]

(c) **Updating access obligations.** If the access obligations of the cable operator to which the open video system operator is compared pursuant to section 12(b) change, the open video system operator's obligations shall change in the same way, to the same degree, and according to the same schedule for implementation. [NLC Comments, pp. 32-33]

(d) **Measurement of access obligations.** Where channel capacity, services, facilities, or equipment are required under this section, an open video system operator shall be obliged under subsection 12(b)(2)(A) to provide the same channel capacity, services, facilities, and equipment as the cable operator to which it is compared.

(e) **Availability of access channels.**

(1) An open video system operator must make any public, educational, or governmental ("PEG") access channels carried on the open video system available to all persons served by the open video system, whether or not they receive any other services.

(2) An open video system operator must provide to each franchise area the PEG access channels required by its franchising authority, and may not fulfill its access obligations by substituting other channels, including PEG access channels from other franchise areas. [NLC Comments, pp. 40-41]

(3) At the request of the franchising authority, an open video system operator and a cable operator shall interconnect their systems in such a way that PEG access programming may be exchanged between the systems without degeneration.

(4) An open video system operator may, if each affected franchising authority and cable operator consent, fulfill its obligations regarding PEG access by providing additional support for the cable operator's PEG programming, so that any burden on the open video system operator from such support is substantially equivalent to such corresponding burden on the cable operator, and carrying the resulting programming on the open video system.

(f) **Conversion.** To the extent that the open video system requires any special formats or features (such as digitization or compression), the open video system operator must make available any necessary conversion equipment or services without charge to enable PEG programming to be transmitted on the open video system. [NLC Comments, pp. 43-44]

(g) **Unused PEG capacity.** To the extent to which PEG channel capacity is required pursuant to this section, the provisions of 47 U.S.C. § 531(d) shall apply to an open video system.

(h) **Editorial control.** An open video system operator shall not exercise any editorial control over any PEG use of channel capacity.

__13. CONSUMER PROTECTION.

(a) **Negative option billing prohibited.** The provisions of 47 C.F.R. § 76.981(a) shall apply to any open video system. [NLC Comments, pp. 44-45]

__14. ENFORCEMENT.

(a) **Investigation.**

(1) The Commission may investigate any potential violation of this Part either—

- (A) upon complaint by any person, or
- (B) at any time on its own motion.

(2) In particular, and without limitation, the Commission will investigate under any of the following conditions:

- (A) It appears at any time that one or both of the conditions in section 10(f) of this Part are not met.
- (B) It appears at any time that the open video system operator or any affiliate that provides programming on the system has suffered a loss or earned less than a reasonable rate of return for two years running. [NLC Comments, p. 20]
- (C) A contract for carriage lacks a "most favored nation" clause pursuant to section 10(e)(3) of this Part.
- (D) Contracts for carriage contain inconsistent rates, terms, or conditions without adequate explanation from the open video system operator.
- (E) The Commission becomes aware of any potential violation of this Part.

(b) **No right created by inaction.** No course of past practice or nonenforcement by the Commission shall create any right in any open video system operator to continue or pursue any practice or course of action. No open video system operator shall be relieved of its obligation to comply with any of the provisions of this Part by reason of any failure of the Commission or any other person to enforce prompt compliance.

(c) **Response to information requests.** An open video system operator shall respond promptly and provide information requested by the Commission, whether before or after Commission approval of a certification. An open video system operator shall be responsible for the continuing accuracy and completeness of information furnished to the Commission.

(d) Remedies for violation. If the Commission finds that an open video system operator has failed to comply with the Commission's rules or applicable law, such operator shall be subject to the following remedies:

(1) Decertification. [NLC Comments, p. 28]

(A) The Commission shall decertify an open video system operator that it finds to have knowingly committed a substantial violation.

(B) The Commission may decertify an open video system operator for repeated violations.

(C) The Commission shall decertify an open video system operator if it finds that such operator has sought to manipulate procedures under this Part or otherwise to evade the Commission's regulations or applicable law.

(D) Before decertifying an open video system operator, the Commission shall afford such operator a full opportunity to respond to all claimed violations, pursuant to the Commission's rules. At least thirty days prior to any decision by the Commission, the Commission shall publish public notice, sending a copy of such notice to all franchising authorities in whose franchise areas the open video system operates. The Commission shall accept and review all comments submitted in connection with such decertification proceedings.

(E) If the Commission decertifies an open video system operator, such operator must within 180 days obtain cable franchises pursuant to Title VI of the Communications Act of 1934, as amended, in any franchise areas where the open video system operates. If such operator has not obtained a cable franchise in any such area, the operator shall cease operations 180 days after decertification. This time period may be extended for a given franchise area by mutual agreement of the franchising authority and the operator.

(2) The Commission may levy fines or forfeitures against an open video system operator for violations of this Part or applicable law.

(3) The Commission may impose or seek such other remedies against an open video system operator, for violations of this Part or applicable law, as may fall within the Commission's general powers.

__ .15. DISPUTE RESOLUTION.

(a) Applicability.

(1) The Commission has authority to resolve disputes over carriage on an open video system under 47 U.S.C. § 573 and this Part, including disputes regarding discrimination and carriage rates.

(2) The Commission will not resolve issues in any such dispute that do not arise under 47 U.S.C. § 573, including, without limitation, issues relating to ownership, control, or management of, or compensation for the use of, public rights-of-way. [NLC Comments, p. 73]

(3) Any aggrieved party may seek any other remedy available under applicable law for any dispute arising under 47 U.S.C. § 573 or this Part, and shall not be required to seek resolution by the Commission as a prerequisite to any such remedy or proceeding.

(b) Complaint.

(1) A person wishing the Commission to resolve a dispute under this section shall file a complaint with the Commission in accordance with the requirements of Part 1 of this chapter.

(2) Any complaint shall include a certification by the complainant that the complaint does not seek to have the Commission rule on issues relating to ownership, control, or management of, or compensation for the use of, public rights-of-way. [NLC Comments, p. 73]

(3) Any complaint, and all subsequent pleadings and briefs, as well as all letters, documents, or other written submissions, shall be served on the defendants, and on any franchising authority in whose franchise area any alleged violation may take place, or which may be affected by any such violation, on the same day on which they are filed at the Commission.

(c) Burden of proof. In disputes under this section, the open video system operator shall have the burden of showing that its treatment of video programming providers is nondiscriminatory, that its rates, terms, and conditions are just and reasonable and are not unjustly or unreasonably discriminatory, and that its treatment of video programming providers is otherwise in compliance with the requirements of this Part.

(d) [General procedures may be added here if necessary]

(e) Time limit. The Commission shall resolve any dispute brought under this section within 180 days after the complaint is filed with the Commission.

(f) Remedies. In resolving a dispute under this section, the Commission may require carriage, award damages to any person denied carriage, or any combination of such sanctions.

__16. REVIEW OF OPEN VIDEO SYSTEM RULES.

(a) Biennial review. One year after the Commission's initial rules under this Part take effect, and every other year thereafter, the Commission shall review its rules under this Part.

(b) Purpose. The Commission's review under this section shall be conducted to determine whether changes in the Commission's rules are necessary or would be advisable —

- (1) to ensure that open video system operators are prohibited from discriminating among video programming providers with regard to carriage;
- (2) to ensure that the rates, terms, and conditions for such carriage are just and reasonable, and are not unjustly or unreasonably discriminatory; or
- (3) otherwise to serve the public interest, convenience, and necessity.